EE & LIM ADVOCATES

v.

GIN NAM DEVELOPMENT CORP. SDN. BHD. & ANOR.

HIGH COURT BORNEO
HAIDAR MOHD. NOOR J
[ORIGINATING SUMMONS NO. KG 138 OF 1991]
20 DECEMBER 1991

CONTRACT: *Acceptance of proposal - Absolute and unqualified - Contracts Act 1950, s. 7*

CIVIL PROCEDURE *- Forfeiture of deposit - Balance of purchase price not paid within certain time limit - Balance of purchase price to be paid by way of bank loan - Deposit refundable if loan not approved - Approval subject to certain terms and conditions not acceptable to Purchaser - Whether deposit should be refunded to Purchaser by stakeholder - Rules of the High Court 1980, O. 17 r. 1(a).*

WORDS AND PHRASES: *"Approval" - Whether includes approval subject to certain terms and conditions.*

This originating summons is filed by plaintiff as stakeholder for interpleader relief.

The first defendant/claimant is the Vendor and the second defendant/claimant is the Purchaser of a piece of land with building thereon for the sum of RM480,000. According to Clause 2 of the sale and purchase agreement, a sum of RM100,000 was paid by the second defendant/claimant upon execution thereof and to be deposited with the plaintiff as stakeholder until such time as provided in Clause 3 thereunder.

Clause 2 reads:

> 2. The purchase price shall be Malaysian Ringgit Four Hundred And Eighty Thousand Only (RM480,000) and shall be paid and satisfied by the Purchaser as follows:
>
> (i) the sum of Malaysian Ringgit One Hundred Thousand Only (RM100,000) upon the execution of their agreement as deposit and part payment of the purchase price, to be deposited with Messrs Ee & Lim Advocates, who shall hold the deposit as stakeholder until such time as provided in Clause 3 hereunder.
>
> (ii) the balance of Malaysian Ringgit Three Hundred And Eighty Thousand Only (RM380,000) shall be paid in the following manner:
>
> (a) the sum of RM100,000 immediately within 2 months from the date of execution hereof; and
>
> (b) the sum of RM280,000 by way of the said loan which must be released by the said Bank within 2 months from the date hereof.

Clause 3 reads:

> 3. It is agreed that if the said loan is not approved by the said Bank, then the said deposit of RM100,000 ... shall be refunded to the Purchaser whereupon this agreement shall be deemed to be mutually rescinded and of no effect whatsoever ...

The second defendant/claimant had applied to Public Finance Berhad ("PFB") for a fixed loan of RM280,000. The application was approved *subject to certain terms and conditions* in respect of personal guarantees to be given by all the directors of the second defendant/

claimant and the interest rate imposed. After negotiations between the second defendant (claimant and PFB, the conditions imposed are still not acceptable to the second defendant (claimant whereupon the application for fixed loan of RM280,000 was rejected by PFB or the "approval" was withdrawn.

The whole issue thus hinges on the interpretation or meaning to be given to the word "approval".

Held:

[1] In order to convert a proposal into a promise the acceptance must be absolute and unqualified (s. 7 of the Contracts Act 1950). Therefore, in order to constitute "approval" in the context of the letter of PFB, the acceptance by the second defendant/claimant must be without qualification.

[2] In the circumstances, there has been no approval of the loan by PFB and the deposit of RM100,000 should be refunded to the second defendant/claimant by the plaintiff.

[3] The sale and purchase agreement should therefore be deemed mutually rescinded and of no effect whatsoever.

[4] As to costs, the first defendant/claimant was ordered to pay the costs of this originating summons to the plaintiff. In view of the conduct of the first defendant, it should pay the costs of the second defendant as well.

[Deposit of RM100,000 to be refunded to the second defendant. Sale and purchase agreement mutually rescinded. First defendant/claimant to pay the costs of plaintiff and second defendant/claimant.]

Legislation referred to:
Contracts Act 1950, s. 7
Rules of the High Court 1980, O. 17 rr. 1(a) , 5(2)

For the plaintiff - Chan Siew Yan; M/s. Ee & Lim
For the 1st defendant - Chew Pok Oi; M/s. Chew, Jugah, Wan Ullok Goh & Co.
For the 2nd defendant - Peter Mijim; M/s. Battenberg & Talma

JUDGMENT

Haidar Mohd. Noor J:

This originating summons is filed by Ee & Lim, advocates under O. 17 r. 1(a) of the Rules of the High Court 1980 ('RHC') as stakeholder, for interpleader relief against the claims of Gin Nam Development Corporation Sdn. Bhd., as Vendor ("1st defendant/claimant") and Singapore Cargo Travel Agency Sdn. Bhd., as Purchaser ("2nd defendant/claimant"). The originating summons is supported by the affidavit of Chan Siew Yan, an advocate of the plaintiff firm.

Counsels at the outset of the hearing applied to the Court to decide the issue summarily under O. 17 r. 5(2) of RHC as the issue is essentially one of law. The issue relates to the interpretation of Clause 2(ii)(b) of the sale and purchase agreement dated 7 June 1991 (Exh. 'CSY2'). The facts are not in dispute and are sufficiently set out in the affidavit of Chan Siew Yan.

Briefly, the subject matter is in respect of the purchase by the 2nd defendant/claimant from the 1st defendant/claimant of all that parcel of land together with the four-storey corner shophouse thereon and appurtenances thereof situated at Ban Hock Road, Kuching described as Lot 326, Section 47 Kuching Town Land District ("the said land") for the sum of

RM480,000. According to Clause 2 of CSY2 a sum of RM100,000 was paid by the 2nd defendant/claimant upon the execution of CSY2 and deposited accordingly with the plaintiff as stakeholder until such time as provided in Clause 3 thereunder.

Clause 2 of CSY2 reads:

> 2. The purchase price shall be Malaysian Ringgit Four Hundred And Eighty Thousand Only (RM480,000) and shall be paid and satisfied by the Purchaser as follows:
>
> (i) the sum of Malaysian Ringgit One Hundred Thousand Only (RM100,000) upon the execution of this agreement as deposit and part payment of the purchase price, to be deposited with Messrs Ee & Lim Advocates of No. 4, Petanak Road, Kuching who shall hold the deposit as stakeholder until such time as provided in Clause 3 hereunder;
>
> (ii) the balance of Malaysian Ringgit Three Hundred And Eighty Thousand Only (RM380,000) shall be paid in the following manner:
>
> (a) the sum of RM100,000 immediately within a month from the date of execution hereof; and
>
> (b) the sum of RM280,000 by way of the said loan which must be released by the said bank within 2 months from the date hereof.

It would seem clear that by Clause 2(ii)(b) the sum of RM280,000 by way of a loan from a bank or financial institution, and in this case the Public Finance Berhad, ('PFB'), must be released by PFB within 2 months from the date of the sale and purchase agreement. In other words the said sum must be released to the 1st defendant/claimant by 7 August 1991 (the completion or settlement date) failing which the sum of RM100,000 shall be forfeited to the 1st defendant/claimant whereupon CSY2 shall be deemed to be mutually rescinded. It is to be noted, however, that Clause 2(ii)(b) will have to be read with Clause 3 of CSY2.

Clause 3 reads:

> 3. It is agreed that if the said loan is not approved by the said bank, then the said deposit of RM100,000 deposited with Messrs, Ee & Lim advocates as provided in Clause 2(i) above shall be refunded to the Purchaser whereupon this agreement shall be deemed to be mutually rescinded and of no effect whatsoever. If the said loan shall be approved, then the said deposit shall forthwith be released to the Vendor. The stakeholder is hereby irrevocably authorised to release the said deposit in the manner as provided herein and each party shall fully indemnify the stakeholder accordingly.

The whole issue thus hinges on the interpretation or meaning to be given to the word 'approval'. In this respect it is pertinent to examine the letter from PFB to the 2nd defendant/claimant (Exh. 'CSY16') pertaining to the application for a fixed loan of RM280,000. According to CSY16 the application was approved **subject to certain terms and conditions** enumerated thereunder. It is not disputed that two conditions imposed by PFB were not acceptable to the 2nd defendant/claimant. The conditions are in respect of the personal guarantees to be given by all the directors of the 2nd defendant/claimant and the interest rate imposed. After negotiations between the 2nd defendant/claimant and PFB in respect of the conditions imposed failed, PFB by its letter (Exh. 'CSY6') said "we regret to advise that we are unable to accomodate your application". In other words, in my view, the application for a fixed loan of RM280,000 by the 2nd defendant/claimant was rejected or 'approval' withdrawn by PFB. The question is - has there been an approval of the loan by CSY16 in the context of Clauses 2 and 3 of CSY2. Counsel for the 1st defendant/claimant asserted that there was an approval whereas the Counsel for the 2nd defendant/claimant contended that there was no approval as such as at best it was only a qualified approval that is subject to fulfillment of certain

conditions. It is apparently clear, in my view, that in order to convert a proposal into a promise the acceptance must be absolute and unqualified (see s. 7 of the Contracts Act 1950). Therefore in order to constitute 'approval' in the context of the letter of PFB (CSY16) the acceptance by the 2nd defendant/claimant must be without qualifications. The acceptance must be absolute and unqualified and which is not the case here. In the circumstances as per Clause 3 of CSY2 I am of the opinion that there has been no approval of the loan by PFB and the deposit of RM100,000 should be refunded to the 2nd defendant/claimant by the plaintiff and I do so order. CSY2 should therefore be deemed mutually rescinded and of no effect whatsoever.

As to costs I order that the 1st defendant/claimant should pay the costs of this originating summons to the plaintiff. In view of the conduct of the 1st defendant/claimant I order that it pays the costs of the 2nd defendant/claimant as well.

Also found at [1992] 3 CLJ 1575